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November 15, 1993

William F. Caton
Acting Secretary
Federal Communications Commission
Room 242
1919 M Street, NW
Washington, D.C. 20554

RE: ET Docket No. 93-266
Review of the Pioneer's Preference Rules

Dear Mr. Caton:

Enclosed herewith for filing are an original and four copies of the Comments of Digital Satellite Broadcasting Corporation in the above-referenced proceeding.

I am also enclosing a copy marked "receipt copy" to be stamped as received and returned to us.

If you have any questions concerning this filing, please contact the undersigned attorney.

Respectfully submitted,

W. Theodore Pierson, Jr.
Counsel for Digital Satellite
Broadcasting Corporation

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Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Review of the Pioneer's Preference Rules	)	ET Docket No. 93-266
	)	

COMMENTS OF DIGITAL SATELLITE BROADCASTING CORPORATION

Digital Satellite Broadcasting Corporation ("DSBC"), by its attorneys, pursuant to the Notice of Proposed Rulemaking ("NPRM"), FCC 93-477, released October 21, 1993, hereby submits its Comments on the Commission's NPRM in the above-captioned proceeding.[1] In the view of DSBC, the Commission's authority to utilize competitive bidding to select licensees eliminates the basis for the Pioneer's Preference rules. Moreover, as DSBC has demonstrated in earlier filings, the Commission's Pioneer's Preference procedures are unsound as a matter of law and policy. DSBC, therefore, urges the Commission to repeal the Pioneer's Preference rules.

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[1] DSBC is an applicant for a license in the Digital Audio Radio Service ("DARS"). Application of DSBC, File Nos. 28-DSS-LA-93; 12/13-DSS-P-93. On June 2, 1993, DSBC filed a request for a Pioneer's Preference in the DARS rulemaking. Consequently, DSBC has a direct interest in the Commission's disposition of the issues raised in the NPRM.

DISCUSSION

The Pioneer's Preference rules were designed to promote development of new technologies and services by awarding a "pioneer" a license without being subject to competing applications. These rules were implemented to offset the delays and risks innovators faced in obtaining a license through either comparative hearings or random selection. Comparative hearings were time consuming and costly for all parties and delayed the initiation of new services. The volume of applications filed in a random selection proceeding diminished the chances of a pioneer receiving a license and left the pioneer with no control over license assignment.

In contrast, in a competitive bidding environment, a pioneer is ensured a license if it bids high enough. Thus, the issue becomes the pioneer's ability to raise sufficient funds to submit a winning bid. If the pioneer has a truly innovative technological advancement, the value of the innovation will be considered in the marketplace and the pioneer will be able to secure sufficient financing to obtain a license. Thus, competitive bidding eliminates the need for a preference to ensure that a pioneer receives a license, eliminating the underlying basis for the pioneer's preference rules.

Even absent the new dynamic for license assignments created by auction authority, the Preference Program is unsound as a matter of

law and policy, as DSBC has demonstrated in previous filings.[2] DSBC has shown that the Commission's Pioneer's Preference policy violates the Ashbacker doctrine that the grant of one mutually exclusive application without a full evidentiary hearing as to all deprives other applicants of their statutory rights to a hearing.[3] The guarantee of a license to a "pioneer" operates as a denial of the rights of the mutually exclusive applicants to a hearing on the merits of their applications.

DSBC has also established that the Pioneer's Preference policy is unsound as a matter of public policy.[4] A majority of the Commission has repeatedly expressed understandable and increasing skepticism as to the efficacy and implementation of the Pioneer's Preference rules.[5] Some Commissioners have expressed concern that preference decisions based on unclear standards could delay the introduction of new services and cast doubt on the Commission's licensee selection process because clear distinctions between preference requests are difficult, at best.

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[2] See, e.g., Letter to Ms. Donna Searcy, Secretary, Federal Communications Commission, (filed June 2, 1993) (reiterating DSBC's belief that Pioneer's Preferences are unsound); Reply of Digital Satellite Broadcasting Corporation, GEN Docket 90-357 (filed March 1, 1993) at 24-26; Reply of Digital Satellite Broadcasting Corporation, GEN Docket No.90-357 (filed February 17, 1993) at 2-14 incorporated herein by reference and attached as Appendix A.

[3] Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

[4] Reply Comments of Digital Satellite Broadcasting Corporation (filed February 17, 1993) Appendix A, at 11-14.

[5] Indeed, Commissioner Duggan reiterated his concern in connection with the instant NPRM.

Pioneer's preference requests have indeed added to the Commission's administrative burden and slowed the licensing process. The Commission expends considerable time and resources to distinguish between preference requests in order to identify a pioneer. For example, the Commission received 96 Pioneer's Preference requests in the 2 GHz Personal Communications Service. An initial review of these requests resulted in the dismissal of 39 filings. After reviewing the merits of the 57 requests that were accepted for filing, including pleadings, comments, technical filings, and experimental reports, only three received a tentative pioneer's preference. Competitive bidding will reduce the Commission's administrative burden by shifting to the capital markets the analysis and recognition of a pioneer's innovation.

Although DSBC recognizes that the Commission has affirmed that the Pioneer's Preference rules are consistent with the Ashbacker doctrine and that there is a public interest basis for the rules,[6] DSBC is confident that the Commission will now concur that, whatever the wisdom of Pioneer's Preference rules until now, they are especially infirm in a competitive bidding environment.

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[6] Pioneer's Preference Memorandum Opinion and Order, FCC 93-116 (March 8, 1993). In spite of the Commission's affirmation, these issues have not been finally resolved by the Courts and, as the Commission has recognized in the instant NPRM, circumstances have changed in light of auction authority.

CONCLUSION

Review of the Pioneer's Preference rules is timely given the changed circumstances attending the grant of competitive bidding authority, the legal infirmity of the Pioneer's Preference policy, and the Commission's long-standing and increasing dissatisfaction with the administration and standards of the Pioneer's Preference. DSBC maintains that the Commission must balance the continued need for the Pioneer's Preference policy to stimulate new technological developments against the incentive created by marketplace recognition and support of technologically innovative developments. Careful consideration of these factors leads to the inescapable conclusion that the basis for the Pioneer's Preference policy has been eliminated and that the Pioneer's Preference rules must be repealed.

Respectfully Submitted

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November 15, 1993

APPENDIX A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services	))))	GEN Docket No. 90-357

REPLY OF DIGITAL SATELLITE BROADCASTING CORPORATION

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February 17, 1993

SUMMARY

The comments of Satellite CD Radio ("SCDR") oppose the request of Digital Satellite Broadcasting Corporation ("DSBC") that the Commission promptly establish an advisory committee to negotiate proposed technical rules for the Digital Audio Radio Service ("DARS"). SCDR argues that it would be premature for the Commission to initiate a negotiated rulemaking before granting its pending Pioneer's Preference request.

- The Pioneer's Preference procedure violates the well-established Ashbacker doctrine that the grant of one mutually exclusive application without a full evidentiary hearing as to all deprives other applicants of their statutory rights to a hearing.
    - Where a mutually exclusive applicant has requested a pioneer's preference, the Commission must give all applicants a full comparative hearing before awarding a preference.
    - The guarantee of a license to a pioneer operates as a denial of the hearing rights of mutually exclusive applicants to a hearing on the merits of their applications.
        - Granting an application based on "innovativeness" in the absence of "full" comparative consideration ignores whether the public interest would be better served by a competing application that may also be innovative.
        - A dispositive preference may eliminate from the licensing process mutually exclusive applicants that propose systems that conflict with the pioneer's.
        - Without considering the merits of each application, the Commission risks granting a preference to an applicant that would not otherwise be granted.
        - To avoid denying applicant's hearing rights by granting a dispositive preference, the preference analysis must conducted in an adjudication.

- A majority of the Commission has expressed understandable and increasing skepticism as to efficacy and implementation of the Pioneer's Preference rules.
    - Preference decisions based on unclear standards could delay introduction of new services and cast doubt on the process.
    - Commissioners have urged that the process be reviewed and revised.
- Given the legal and policy questions surrounding the Pioneer's Preference the Commission should advance the DARS proceeding by initiating a negotiated rulemaking without ruling on Pioneer's Preference requests.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services	))))	GEN Docket No. 90-357

REPLY OF DIGITAL SATELLITE BROADCASTING CORPORATION

Digital Satellite Broadcasting Corporation ("DSBC"), by its attorneys, hereby replies to the "Comments of Satellite CD Radio, Inc. ("SCDR") on [DSBC's] Request for Establishment of an Advisory Committee to Negotiate Proposed Regulations."[1] SCDR opposes a negotiated rulemaking prior to the completion of Pioneer's Preference proceedings. DSBC believes that the Pioneer's Preference policy utilized by the Commission is of doubtful legality and represents unsound policy. It has little relevance to the initiation of a negotiated rulemaking. DSBC reiterates its request that the Commission promptly establish an advisory committee to negotiate technical rules for the Digital Audio Radio Service ("DARS").

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[1] Gen. Docket No. 90-357, filed February 3, 1993 ("SCDR Comments").

I. SCDR Comments.

In the interest of expediting the DARS proceeding, on January 18, 1993, DSBC requested that the Commission immediately convene an advisory committee to negotiate proposed technical rules for DARS. In its comments on that request, SCDR states that it would be premature to proceed to a negotiated rulemaking before its pending Pioneer's Preference request has been granted. SCDR maintains that the presence of a tentative selectee will further technical discussions by permitting one proposal to be used as the benchmark for technical issues, thus, allegedly streamlining technical negotiations and the licensee selection process. SCDR, therefore, urges the Commission to complete the Pioneer's Preference process by setting a cut-off date for preference requests and choosing a tentative preference selectee. Finally, as it has throughout the DARS proceeding, SCDR takes the opportunity to again champion its Pioneer's Preference request.[2]

II. The Pioneer's Preference Procedure Violates the Ashbacker Doctrine.

It is well established that the Commission has the authority, in connection with its statutory mandate to regulate radio services in a manner consistent with the public interest, to establish threshold eligibility criteria that may be applied to applicants

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[2] See, e.g., Comments of Satellite CD Radio, Gen. Docket No. 90-357 at 19-21 (filed Jan. 29, 1993); Opposition to Petitions to Deny and Response to Comments of Satellite CD Radio, FCC File No. 49/50-DSS-P/L-90 at 26-30 (filed Dec. 1, 1992); SCDR Compendium of Applications, filed Sept. 14, 1992.

for licenses.[3] It is also undisputed, however, that the Commission is required by statute to hold a comparative hearing before granting any one application that is mutually exclusive with other bona fide applications.[4] The reconsideration of these principles is at issue both here and in the Commission's Pioneer's Preference rulemaking.

Under Section 309(a) of the Communications Act the Commission will grant a radio station application only if the grant of the application is found to further the public interest, convenience and necessity.[5] Section 309(e) of the Act provides that where a substantial and material question of fact is presented by an applicant the Commission shall formally designate the application for hearing.[6] The section also provides that the hearing shall be a full (i.e., evidentiary) hearing in which all parties in interest shall be permitted to participate and adduce factual evidence.[7]

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[3] United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) ("Storer"). See also Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987); Aeronautical Radio, Inc. v. FCC, 928 F.2d 428 (D.C. Cir. 1991).

[4] Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 (1945) ("Ashbacker").

[5] 47 U.S.C. § 309(a).

[6] 47 U.S.C. § 309(e).

[7] In Storer, the Court defined the term "full hearing" to mean that "every party shall have the right to present his case or defense by oral or documentary evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." Storer, 351 U.S. 202.

The Supreme Court has made clear that the grant of one application without a full hearing as to all deprives the non-granted applicants of the statutory right to a full hearing.[8] Granted, the right to a hearing guaranteed to mutually exclusive applicants by Ashbacker is not without limits. The Supreme Court has upheld the Commission's determination that it may impose threshold eligibility criteria for applicants that may render an application ineligible for grant and thus operate to deny a hearing to an applicant.[9] The issue thus becomes whether a Pioneer's Preference to one or more applicants without an evidentiary hearing is a permissible threshold criteria or a denial of Ashbacker rights. The answer to this question turns primarily upon the effect of the Pioneer's Preference upon the ability of the other applicants to obtain an equivalent license.

[8] See Ashbacker, 326 U.S. at 333.

[9] See Storer, 351 U.S. at 203-205.

A. Where A Mutually Exclusive Applicant Has Requested A Pioneer's Preference, The Commission Must Give All Applicants A Full Comparative Hearing Before Awarding A Preference.

1. When Awarding A Pioneer's Preference, The Commission Makes A Fact-Based Determination Without The Benefit Of An Evidentiary Inquiry.

In the Pioneer's Preference proceedings[10] the Commission determined that the question of "innovativeness" of a particular spectrum use proposal is to be resolved in the course of an allocation rule making proceeding.[11] The Commission considers comments on Pioneer's Preference requests separately from the petitions for rulemaking with which they are associated by establishing a cut-off date for both comments on pending petitions and the submission of mutually exclusive requests for Pioneer's Preferences.[12] The Commission then issues a tentative conclusion as to whether a Pioneer's Preference will be awarded.[13]

In the Pioneer's Preference proceeding the Commission has elevated the importance of the "innovativeness" of an applicant's proposal to the point where any applicant who makes the showing in

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[10] Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488 (1991) ("Pioneer's Preference Order"), recon. in part, 7 FCC Rcd 1808 (1992) ("Pioneer's Preference Recon.").

[11] Pioneer's Preference Recon., 7 FCC Rcd at 1812.

[12] 47 C.F.R. §§ 1.402(c) and (e).

[13] Pioneer's Preference Order, 6 FCC Rcd at 3496.

a given case will be guaranteed a license if otherwise qualified and in spite of other public interest attributes mutually exclusive applicants might possess or public interest negatives of the innovator. The determination of whether a proposal is "innovative" is based on a factual inquiry requiring substantial analysis of submissions by preference proponents.[14] For example, in the DARS preference proceeding the Commission would be required to consider detailed and complex factual submissions regarding system design and modulation techniques that may be probative of nothing when compared with other applicants. The tentative preference award is, in theory, subject to reversal or denial in the final report and order. However, the Commission has stated that it will not lightly reverse a tentative preference grant for fear of misleading the pioneer and the financial community -- and as a matter of practicality the Commission is highly unlikely to do so once the applicant and it financiers have taken steps in reliance on the tentative decision.[15] The tentative grant is tantamount to a final Pioneer's Preference award.

The Commission is thus making a factual determination on the issue of the "innovativeness" of various proposals in the context of a rulemaking proceeding, not an adjudication. Once a preference

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[14] Pioneer's Preference Order, 6 FCC Rcd at 3494. "[A]pplication of this standard to any Pioneer's Preference request will, of course, be completed on a case-by-case basis."

[15] Pioneer's Preference Order, 6 FCC Rcd at 3496.

is awarded, the Commission will no doubt use the innovativeness determination as a basis for denying any other applications that are mutually exclusive without a hearing on the merit of those applications. Thus, the grant of a Pioneer's Preference is made by rulemaking, and not the full hearing guaranteed by Section 309 of the Act.

2. The Guarantee Of A License to Any Pioneer Operates As A Denial Of The Rights Of All Mutually Exclusive Applicants To A Full Hearing On The Merits Of Their Own Applications.

The Commission has stated that any Pioneer's Preference award would be "dispositive" of the question whether a license will be granted to the "pioneer."[16] However, the Commission has failed to explain how grant of a dispositive preference, rather than a comparative preference, comports with the Ashbacker rights of mutually exclusive applicants to full consideration on the merits of their proposals.[17] Grant of one application without a full

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[16] Pioneer's Preference Recon., 7 FCC Rcd 1808 (1992) at 1809.

[17] Ashbacker, 326 U.S. 327 (1945). Each of the six pending DARS applications is mutually exclusive with each other application despite the fact that more than one license probably can be granted. System proponents have described multiple entry schemes that in theory might permit up to four of the six applicants to receive licenses. Thus, the grant of one application will not necessarily require the denial of all other applications. Nevertheless, all six applicants can not be accommodated in the 50 MHz of spectrum available for DARS. The grant of one Pioneer's Preference request could preclude consideration of another applicant's system or modulation technique or could reduce its economic feasibility if it is incompatible with the "pioneer's." The latter applicant is effectively eliminated from the proceeding without consideration of the merits of its proposal.

hearing on all deprives the other applicants of their rights under Section 309(a) of the Communications Act to a determination of whether the public interest would be served by the grant of their applications.[18] Ashbacker requires that the Commission treat all applicants with pending applications for the same frequencies equally.[19]

Once a preference is awarded in the rulemaking proceeding, however, the pioneer will be guaranteed a license in the new service, without being subject to competing applications.[20] In such circumstances, the only way a non-pioneer can secure a license is to demonstrate that the pioneer is not basically qualified to be a licensee. The non-pioneer will never receive a full hearing on the merits of its own application. However, as discussed above, where mutually exclusive applications are on file the Ashbacker decision guarantees that the parties will have their applications considered in a comparative hearing. Moreover, this guarantee requires that the comparative hearing occur before any of the mutually exclusive applications are either granted or denied in any sense, on the issue of innovativeness or otherwise.

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[18] Id. at 330; 47 U.S.C. § 309 (1991).

[19] See, e.g., Rainbow Broadcasting Co. v. FCC, 949 F.2d 405 (D.C. Cir. 1991); Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987).

[20] Pioneer's Preference Order, 6 FCC Rcd at 3492.

In cases where Pioneer's Preference requests have been filed, these guarantees are eviscerated. As a result of the dispositive grant, the award of a Pioneer's Preference no doubt will be largely determinative of the outcome of the licensing process for one or more of the mutually exclusive applications. For example, in the DARS proceeding, some applicants have proposed that the DARS frequency bands be segmented to permit multiple entry. A Pioneer's Preference award to an applicant proposing a particular modulation scheme would effectively deny an application proposing a conflicting modulation technique without considering the merits of the latter applicant's proposal. Thus, awarding a Pioneer's Preference to SCDR's Frequency Division Multiplexing ("FDM") system could, depending on the amount of spectrum it utilizes, preclude the consideration of Code Division Multiplexing ("CDM"), which could permit four competitive entrants in the CDM segment of the DARS band and, DSBC believes, is superior to FDM. A Pioneer's Preference will not establish which modulation technique is the most spectrum efficient and whether alternative modulation techniques may be more appropriate. Under Ashbacker the Commission can not make this determination without holding a full hearing on all relevant issues.

By failing to consider the merits of each mutually exclusive application at the time it awards a preference, the Commission risks granting a dispositive preference based on "innovativeness" to an applicant that would not otherwise be granted if it were

compared to other mutually exclusive applications with stronger public interest factors. For example, the public interest would not be served by grant of a preference to an applicant that proposes a system requiring higher costs to initiate, increasing the costs to consumers, even if the system is the most innovative of several applicants.[21]

The Commission can only correct this defect by making the entire Pioneer's Preference analysis subject to a full hearing as part of the comparative analysis of the merits of each application. Only if each pending applicant is considered individually for a license and has the opportunity to establish that its use of the spectrum best serves the public interest would Ashbacker rights be preserved. Thus, where mutually exclusive applications are pending and there are requests for Pioneer's Preferences, the Commission may not lawfully grant a "dispositive preference" to any "pioneer" without fully considering the public interest merits of the competing applications, a comparative issue not designated in nor appropriate to the preference proceeding.

[21] DSBC's system is considerably less expensive per channel than any other applicant including SCDR.

III. Commission Skepticism Undermines Support For The Pioneer's Preference Procedure As A Matter Of Policy.

Although the Commission voted unanimously to adopt the Pioneer's Preference rules, a majority of the Commissioners have expressed understandable and increasing skepticism as to the rules efficacy and implementation. Commissioners Marshall and Duggan have expressed concern that the Commission's failure to enunciate clear criteria as to what constitutes a new service may create further delay in the licensing process and make it difficult for innovators to determine if their innovations qualify for a preference. They concluded that the Commission may be faced with a flood of preference requests further delaying already lengthy allocations and licensing processes.[22] Similarly, Commissioner Barrett voiced concern that the standards used to award Pioneer's Preferences do not permit clear distinctions between those tentatively selected as Pioneer's Preference recipients and those tentatively denied.[23]

Recent events have proven these concerns to be well-founded. The Personal Communications Services ("PCS") proceeding, for instance, substantiated Commissioner Duggan's fear that engaging in hair-splitting debates over "pioneer" issues will bog down the

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[22] See, Separate Statements of Commissioner Marshall and Commissioner Duggan, Pioneer's Preference Order, 6 FCC Rcd at 3500.

[23] See, Separate Statement of Commissioner Barrett, Mobile Satellite Services Above 1 GHz, 7 FCC Rcd 6414, 6433 (1992) ("Big LEOS").

Commission's processes with administrative litigation, hindering the initiation of new services.[24] Commissioner Duggan recently stated that his original misgivings had increased and, furthermore, that he was not alone in his concern: "My colleagues have expressed similar concerns . . . that are more emphatic when spoken privately. I concur in this decision as a way of underscoring my continuing doubts about Pioneer's Preferences."[25] Commissioner Duggan's concern is justified by the complex factual issues presented by Pioneer's Preference requests. The DARS proposals pose even more complex and difficult technical issues because of the complex nature of the proposals and the embryonic and dynamic nature of the technology. In some respects the differences among competing proposals are relatively small and open to continual debate among experts, rendering difficult a comparative selection and almost impossible a choice of a "pioneer." Decisions on these issues are likely to be contentious and promise substantial delay in the introduction of DARS service to the public.

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[24] Separate Statement of Commissioner Duggan, Pioneer's Preference Order, 6 FCC Rcd at 3500.

[25] Personal Communications Services, 71 RR 2d ___ at 692 (1992) ("PCS Docket"). In the PCS Docket close to one hundred parties filed preference requests, multiple pleadings comprising thousands of pages have been filed by applicants tentatively denied Pioneer's Preferences, and there is the potential for a multitude of petitions for reconsideration and court appeals of the Commission's final Pioneer's Preference decisions. In fact, ten applicants for PCS Pioneer's Preferences have asked the U.S. Court of Appeals in Washington to review the Commission's decision to dismiss their requests. Telecommunications Reports, Feb. 15, 1993 at p. 25.

Commissioner Barrett has wisely questioned whether it is more appropriate to make tentative decisions closer to the time that service rules are proposed rather than early in the proceeding ". . . at a stage . . . [when] it is difficult to assess the relative merits of any new service proposals."[26] If the Commission acts now to resolve DARS Pioneer's Preference requests it will be acting on general system proposals. As the Commission has recognized, the DARS technology is in its infancy but advancing rapidly.[27] Thus, it is unlikely that SCDR's Pioneer's Preference request could be sufficiently supported to meet the Commission's requirement that "applicants provide[] analyses to fully demonstrate technical feasibility."[28] In the absence of such analyses, the Commission requires that applicants commence an experiment and report to the Commission preliminary results.[29] No applicant, including SCDR, has received an experimental license nor commenced an experiment using the applicable frequencies. Thus, it would be premature to consider SCDR's preference at this time. Instead, the Commission should await the submission of experimental data and the further maturation of system and service proposals so that it may make a

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[26] Mobile Satellite Services Above 1 GHz, 7 FCC Rcd 6414, 6433 (1992).

[27] See, Digital Audio Radio Services Notice Of Proposed Rulemaking/Further Notice of Inquiry, Gen. Docket No. 90-357, released Nov. 6, 1992.

[28] Mobile Satellite Systems Above 1 GHz, 7 FCC Rcd at 6421.

[29] 47 C.F.R. Section 5.207.

fully informed decision.[30]

In view of the Commission's increasing dissatisfaction with the administration and standards of the Pioneer's Preference, it is unwise to continue awarding Pioneer's Preferences without a thorough review of the policy.[31] The Commission must consider the continued need for a Pioneer's Preference policy to stimulate new technological developments when balanced against the uncertainty created by vague preference standards and the administrative burdens entailed in reaching preference decisions and resolving the inevitable disputes over tentative selectees. At a minimum, the Commission should suspend the preference policy pending resolution of the issues raised by the Commissioners, and the legal issues raised herein and by other parties seeking reconsideration of the generic proceeding.

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[30] See, e.g., Separate Statement of Commissioner Barrett, Mobile Satellite Services Above 1 GHz, 7 FCC Rcd at 6433. "I question whether our Pioneer's Preference rules should be modified to ensure that [the] tentative decision is made closer to the time that service rules are proposed. I am concerned that at a stage where no experiments have been.authorized, detailed technical feasibility showings have not been made, and no spectrum allocation for a particular service has been completed, it is difficult to assess the relative merits of any new service proposals. . . . [W]ithout significant detailed technical feasibility showings or experimental results, I question whether we should accept Pioneer's Preference applications based on general service proposals only."

[31] Both Commissioner Barrett and Commissioner Duggan have strongly urged the Commission to review and modify the Pioneer's Preference rules in the near future to ensure that the proper choices are made.

IV. The Commission Should Continue To Move Forward In The DARS Rule Making Proceeding By Establishing An Advisory Committee To Negotiate Proposed Rules.

In its comments, SCDR did not object to a negotiated rulemaking process to resolve technical issues. It merely opposes the timing of the negotiated rulemaking, insisting that the Commission initiate a negotiated rulemaking only after it has awarded a Pioneer's Preference, a procedure the Commission has followed in other proceedings.[32]

However, regardless of the procedure followed by the Commission in its prior Pioneer's Preference decisions, it would be unwise for several reasons for it to make even a tentative decision at this time on the Pioneer's Preference request of SCDR. First, as we showed above, there is, quite understandably, increasing Commission skepticism that the Pioneer's Preference as currently conceived and administered is appropriate. Second, as we also showed above, considerable doubt remains as to the legality of the preference scheme. The Commission has a ready vehicle to address the legality in a pending Petition for Further Reconsideration.[33] Third, as we show above, there are fundamental factual issues that will not be resolved by issuing a Pioneer's Preference. Given the disparate technical proposals (e.g., CDM versus TDM/FDM) and the

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[32] SCDR Comments at 5.

[33] Petition for Further Reconsideration in Gen. Docket No. 90-217, filed by TRW, Inc. April 6, 1992.